Purchaser three months' prior notice in writing of his intention to do so.

Accordingly, the appeal is allowed with costs here and in the court below. The appellants are entitled to judgment in respect of all unpaid maintenance and service fees.

Appeal allowed.

Solicitors: *Boswell, Hsieh & Lim; Mak, Ong & Partners.*

A MALAYSIAN REPORTS

SYED ABU BAKAR BIN AHMAD v. PUBLIC PROSECUTOR

B **[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid & Syed Agil Barakbah F.JJ.) November 7 to 9 & December 20, 1983]**

[Kuching – Federal Court Criminal Appeal No. 45 of 1982]

C *Criminal Law & Procedure – Criminal breach of trust – Failure to critically assess and analyse prosecution evidence – Misdirection – Failure of justice – Penal Code, 409.*

Evidence – Expert evidence – Accomplice evidence – Evidence Act 1950, s. 45.

D

In this case the learned trial judge found that the appellant as Director of National Bureau of Investigation, Sarawak was a public servant and in that capacity he was entrusted with dominion over moneys belonging to the Government of Malaysia and was the operator of the funds known as the Secret Service Funds (SSF). It was in respect of moneys from such fund in the amounts stated in both of
E the charges that the learned judge found the appellant to have committed criminal breach of trust.

In regard to the first limb of the first charge, the learned judge found that a sum of $200/- was handed to A.S.P. Ibrahim then attached to NBI Sibu whereas the payment voucher showed there was a payment of $300/-. The appel-
F lant claimed he paid $300/- to Sgt. Paou who was sent to collect the money. The learned trial judge found that the words "tiga ratus sahaja" and the figure $300/- was not in the handwriting of Sgt. Paou but appeared to come from the same pen used by the appellant to sign his name and write down the receipt number.

G In regard to the second limb, the learned judge found that certain payments of rewards were not received by the persons to whom they are alleged to have been paid. Payment vouchers were signed by the appellant and blank receipts were prepared which were signed by an Assistant Director Poh of Kuching.

H The second charge related to a payment to A.S.P. Daniel Chai of $500/-, which A.S.P. Daniel Chai said he never received. The appellant stated that Daniel Chai had asked for the money to pay informers but as he was in a hurry no signature was taken. Subsequently a temporary receipt was prepared by the appellant. He then contacted Daniel Chai for the refund of the money and eventually
I received $500/- back. The learned trial judge disbelieved the appellant and his witnesses and found the appellant guilty. The appellant appealed.

Held: (1) it is a settled principle that while a judge who sits alone is entitled to weigh all the evidence, to put his magnifying glass to determine the probabilities and form his own opinion or judgment, it would be erroneous for

him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence. In this case as the document was not examined by an expert in handwriting, it was not correct for the judge to come to a finding of fact that the writing on the receipt appeared to come from the same pen used by the appellant to sign his name and write the receipt number;

(2) in view of the circumstances the learned trial judge ought to have critically analysed the evidence of Sgt. Paou and ought to have considered that Sgt. Paou had every reason to lie to save his own skin;

(3) in regard to the second limb of the first charge. A.S.P. Poh was an accomplice. By reason of the character and conduct of Poh in the matter, his evidence should have been treated with greatest suspicion and the learned judge ought to have minutely and critically scrutinized it. The learned judge had not effected a microscopic scrutiny and embarked upon a critical appreciation of Poh's evidence to justify the appeal court to affirm his finding and sustain the conviction. Although the trial judge had the advantage of having seen and heard the witness his approach to the question of credibility was gravely erroneous and there was serious misdirection which occasioned a failure of justice;

(4) in regard to the second charge again there was a real necessity for the learned judge to treat the evidence of Daniel Chai with great suspicion and then to critically assess it, test in its totality, and also to microscopically analyse it to determine what credit if any could be attached to his testimony. The omission or failure to take into consideration a factor such as this constitutes a serious misdirection as to occasion a failure of justice. Such a misdirection goes to the root of the matter and it materially affected the very foundation upon which the learned judge grounded his findings.

Cases referred to:

(1) *Wong Swee Chin* v. *Public Prosecutor* [1981] 1 M.L.J. 212.
(2) *R.* v. *Tilley* 45 Cr. App. R. 360.
(3) *John David O'Sullivan* 53 Cr. App R. 274.
(4) *R.* v. *Baskerville* [1916] 2 K.B. 658, 663.
(5) *Chandrasekaran & Ors.* v. *Public Prosecutor* [1971] 1 M.L.J. 153, 155.
(6) *Bhuboni Sahu* v. *King* (1949) 76 I.A. 147; A.I.R. 1949 P.C. 257.
(7) *Davies* v. *Director of Public Prosecutions* [1954] 1 All E.R. 507.
(8) *Tengku Mahmood* v. *Public Prosecutor* [1974] 1 M.L.J. 110
(9) *Kim Guan & Co. Sdn. Bhd.* v. *Yong Nyee Fan & Sons Sdn. Bhd.* [1983] 2 M.L.J. 8, P.C.
(10) *Chow Yee Wah & Anor* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

FEDERAL COURT.

J.J. Goldberg for the appellant.
Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Abdul Hamid F.J. (judgment of the Court read by Lee Hun Hoe C.J. (Borneo)): The appellant Syed Abu Bakar bin Ahmad was convicted in the High Court in Borneo at Kuching on September 25, 1982 on two charges, the first amended, as follows:-

Amended First Charge:

"That you between the 23rd day of February 1974 and the 12th day of December 1974 at the office of the National Bureau of Investigation, Kuching, in the First Division in the State of Sarawak being a public servant namely Director of National Bureau of Investigation, Sarawak and in such capacity entrusted with dominion over certain property, to wit, a sum of money belonging to the Government of Malaysia, committed criminal breach of trust in respect of the said property by misappropriating a sum of $300/- and that you have thereby committed an offence under Section 409 of the Penal Code."

Second Charge:

"That you on 31st day of May 1975 at the office of the National Bureau of Investigation, Kuching, in the First Division in the State of Sarawak being a public servant namely Director of National Bureau of Investigation, Sarawak and in such capacity entrusted with dominion over certain property, to wit, a sum of money belonging to the Government of Malaysia, committed criminal breach of trust in respect of the said property by misappropriating a sum of $500/- and that you have thereby committed an offence punishable under section 409 of the Penal Code."

Upon conviction the appellant was sentenced to one year imprisonment on each charge, both sentences to run consecutively.

The learned trial judge was satisfied that the appellant, as Director of National Bureau of Investigation (NBI) Sarawak, was a public servant (s.8, Biro Siasatan Negara Act, 1973). In that capacity from January 1974 to the end of December, 1975, a period of two years, he was entrusted with dominion over moneys belonging to the Government of Malaysia and was the operator of the funds known as Secret Service Funds (SSF). It is in respect of the moneys from such fund in the amount stated in both the charges that the learned Judge found the appellant to have committed criminal breach of trust.

The Secret Service Funds (SSF)

Evidence was led before the trial Judge and it is not in dispute that the SSF was under the overall management of the Director-General of NBI at the Headquarters in Kuala Lumpur and to be operated in accordance with a directive called the Inspector-General of Police Directive No. 9 of September

29, 1984. We do not propose to state in detail what the directive is, suffice to say that one of the purposes of the fund was, generally, for the payment of rewards to agents and informers for information leading to the apprehension of criminals.

The appellant as State Director, a secondary operator, had the authority to pay rewards. He was, however, required to keep documents and records such as cash book, receipt book and file containing payment vouchers, receipts and bank statements. As secondary operator he was responsible to the Director-General, but nevertheless had authority to authorise payment. He was also the paying officer. In his operation of the SSF in compliance with the directive (No.9) for every payment the appellant had to fill up payment vouchers and other details such as the number of the voucher, the amount in words and figures, the purposes of payment, date of authorisation, date of payment and signature of account operator, authorising officer, paying officer and the recipient. All the expenditure in each month had to be accounted for in the returns to be submitted before the 10th of the following month covering the previous month's expenditure. He was to certify, *inter alia*, that he checked the bank balance and cash balance in hand, the unused receipts and the total expenditure incurred and found to be correct. The returns were required to be sent to the Accountant-General's office in Kuala Lumpur together with bank statement and other relevant documents.

In the operation of the account the operator had not only to fill up all the details in the receipt but also to get the recipient to sign before him as paying officer. A payment cannot be made without the recipient himself signing the receipt for it. Nobody else on his behalf can.

The First Charge – two limbs

There are two limbs to this charge: first, it relates to a sum of $100. The learned Judge found that a sum of $200 was handed to ASP Ibrahim Junaidi (PW10) then attached to NBI, Sibu as OC whereas the payment showed that there was a payment of $300. According to PW10, he sent a letter dated January 25, 1975 (Ex. P6) which the appellant denied having received requesting for fund and he sent Sgt. Paou (PW8) to collect it. He received $200 from Sgt. Paou. The appellant claimed that he did not receive P6 but did give the money to Sgt. Paou. It was $300, and not $200, as requested by PW10 through Sgt. Paou.

PW10 testified that any payment received and expenditure incurred by him for Sibu was recorded in the returns submitted by him to the appellant and he identified an item of $200 in the returns dated February 1, 1975 (Ex. P7). He also identified the signature of the appellant in the visitors' book (Ex. P8) where figure $200 appeared during the appellant's visit to Sibu on June 28, 1974. The appellant did not really challenge the testimony of PW10 but denied that he had seen the letter (P6) requesting for the $200 not until the trial. He claimed that all letters received by NBI Kuching were stamped with date (see P7) and if there was any request for fund an instruction would have been written on it. The letter requesting payment would thereafter be attached to SS payment voucher as had been done in respect of Ex.P12. Some other documents were produced to support his claim. The appellant pointed out that the February 1974 returns contained the payment he made to NBI Sibu.

The appellant did not deny his signature on P7, but claimed that it was a loose sheet taken from Petty Cash Book maintained by NBI Sibu. He only checked it on its face value and signed. And when he signed it he thought it was Petty Cash Book for open vote. There was a figure $200 dated March 4, 1974 but he had no reason to associate that with the money he gave to Sgt. Paou on February 23, 1974 otherwise he would have queried.

The learned Judge accepted the testimony of PW10 after stating in his judgment that PW10 was subjected to lengthy and penetrating cross-examination and in the end his testimony remained unshakened and thus accepted him as a witness of truth. He also saw no reason why PW10 should testify against the appellant.

Mr. Goldberg, counsel for the appellant, submitted that the learned Judge missed the point in so far as it concerned PW10's testimony and in effect failed to appreciate the defence. The defence did not really dispute that PW10 only received $200 but what was disputed was Sgt. Paou's testimony that he only received $200, and if only $200 was handed to PW10 it meant that Sgt. Paou had failed to account for the other $100

and must therefore have pocketed it. The failure of the learned Judge to appreciate this was because of his failure to adequately analyse and evaluate the evidence of Sgt. Paou. He also submitted that this failure on the part of the learned Judge constituted a serious misdirection.

Pausing at this point we would observe that there was hardly any dispute to PW10's testimony including that concerning the letter (P6) except that it was the appellant's contention that he did not see the letter (P6) until trial of the case. It was therefore a matter for the learned Judge to consider. This he did not do. There was only an adverse comment in the judgment to the effect that it was ridiculous to suggest that the appellant, without checking on Sgt. Paou's identity, would have given Sgt. Paou the money for NBI Sibu unless the appellant had seen the letter (P6) signed by PW10. This point by itself may not help the defence much but in the light of the appellant's contention that the amount requested conveyed through Sgt. Paou was not $200 but $300, it is therefore of utmost importance that Sgt. Paou's testimony be properly scrutinized particularly when the prosecution was relying heavily upon his testimony and his credibility was seriously challenged by the defence.

The fundamental complaint levelled by the appellant against the learned Judge is that he accepted Sgt. Paou as a truthful witness without adequately considering that Sgt. Paou had every reason to lie.

Sgt. Paou (PW8) 39 years, an Iban, was attached to NBI Sibu at the material time. He stated that on February 23, 1974 when he was in Kuching doing official duty he was called by the appellant to his office and there the appellant handed him $200 for Sibu Secret Service Fund to be handed to PW10 on his return to Sibu. The appellant asked him to acknowledge receipt by signing a blank form. He did so and saw no reason to ask why he was made to sign on a blank form. On his return to Sibu he handed the $200 to PW10. Sgt. Paou identified ID3 and ID3A (Ex.P22 A & B) and stated that when he signed ID3A it was attached to ID3 and nothing was written on either ID3 or ID3A.

On the other hand, the appellant stated that Sgt. Paou came to the office at Kuching on February 23, 1974 and introduced himself as Sgt. Paou from NBI Sibu. Sgt. Paou told him that PW10 wanted some money for secret service fund. He then took out a blank SSF payment voucher form and asked Sgt. Paou to fill up the receipted portion and to sign it. Sgt. Paou wrote out the words "tiga ratus *shaja*" (the emphasis is ours) and figure "$300" dated it and put his signature thereon. After this was done he handed $300 cash to Sgt. Paou who put the money in his pocket. Sgt. Paou hesitated and when asked why Sgt. Paou said that as he was to remain in Kuching for a week conducting investigation in connection with the customs and other cases he needed money to entertain informers and being only a sergeant he had none to spare and asked for an advance. It was on that account that he told Sgt. Paou to make use of $100 from the $300 and on his return to Sibu he was to report to PW10 and necessary adjustment was to be made.

As much turns upon the credibility of Sgt. Paou's testimony, we are of the view that the learned Judge ought to have considered whether the appellant had knowledge of the letter and the request made therein. The point is of some significance in that if P6 had not in fact been received by the appellant it became important for the learned Judge to consider whether there was some truth in the appellant's explanation that he gave $300 to Sgt. Paou to meet the request made by PW10 through Sgt. Paou and even if he was not convinced of its truth whether, viewed as a whole, it would have raised a doubt in his mind as to the truth of Sgt. Paou's testimony. The learned Judge ought also to have proceeded to make a critical and searching analysis of the evidence for if Sgt. Paou indeed received $300 but had only delivered $200 to PW10 without accounting to PW10 the other $100 he had therefore pocketed the $100 and had thus every reason to lie. It seems obvious that failure to do so adversely affected the defence. This is not the end of the matter. It is contended that the learned Judge seriously misdirected himself when he proceeded to hold with reference to the handwritten words "tiga ratus shaja" appearing on ID3A (P22B) and also the figure $300", that they were not in the same handwriting as the signature of Sgt. Paou, and, that they appear to come from the same pen used by the appellant to sign his name and to write down the receipt number 26/74.

The complaint is legitimate and we are inclined to agree that the learned Judge was in error when he took upon himself, in the absence of relevant evidence, to conclude on a matter which could

only be concluded with the aid of an expert trained in the relevant field. The question whether it was the appellant's or Sgt. Paou's handwriting was clearly a crucial point and proof beyond reasonable doubt could not otherwise be satisfied without the benefit of any expert evidence. There was none. For reasons unknown the document was never examined by any document examiner.

Perhaps at this juncture it is proper to direct our attention to two aspects of the law concerning (a) the function of the Judge in making conclusion of fact on a matter normally within the province of an expert trained in the relevant fields to give expert evidence and (b) with reference to the present case in what circumstances must the Judge effect a critical and microscopic analysis of the evidence of a witness.

(a) *Handwriting Expert*

Our law is clear in that under section 45 of our Evidence Act 1950 it is provided that

"45. (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts."

The scope of this section can be found in the commentary in *Sarkar* on Evidence 12th ed. at page 488 where, while recognising that opinion in so far as it may be founded on legal evidence shall be the function of the tribunal whose province alone it is to draw conclusions of law or fact –

"There are however cases in which the Court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, e.g. when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision."

A local case where this Court has dealt with section 45 can be found in *Wong Swee Chin* v. *Public Prosecutor*[1] where Raja Azlan Shah, C.J. (as he then was) delivering the judgment of the Court explained who are experts in section 45 of the Act, and then went on to say –

"Our system of jurisprudence does not, generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion."

In the present case Sgt. Paou testified that the signed only on a blank form and he did not write the words "tiga ratus shaja". On the other hand, the defence contended that Sgt. Paou wrote those words "tiga ratus shaja" and signed. There was therefore a dispute as to handwriting and as such it was necessary for the learned Judge as tribunal of fact to make a finding as to the author of those words and figure "three hundred". Since the document was not examined by any person who has acquired a special skill or expert in the particular subject, i.e. handwriting, the question therefore is was the learned Judge right in making the finding of fact that he did in the absence and without the aid of expert evidence?

In our view it would have been quite proper for the learned Judge to conclude that it was not Sgt. Paou's handwriting without going further since Sgt. Paou did say that he only affixed his signature but for the learned Judge to proceed further and hold as he did he was evidently indulging in a determination of a question which was beyond the range of common knowledge. The same would equally apply to the conclusion made by the learned Judge when he stated that they appeared to come from the same pen used by the appellant to sign his name and to write down the receipt number. How could one say with that degree of certainty?

Perhaps it may be appropriate to mention in passing that where there was a dispute as to handwriting and the necessity arose for purposes of comparison, the Judge could have invoked section 73(2) of the Evidence Act. This would enable him to compare the words with any word proved and admitted in evidence.

It is settled principle that while it is true that a Judge who sits alone is entitled to weigh all the

evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.

The criticism levelled at the learned Judge's finding is, in our view, well founded and in this connection we would also in passing refer to section 67 of the Evidence Act which states that –

"67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature of the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting."

We do not propose to consider the full effect of this section in the light of what we have stated earlier.

Learned counsel for the appellant referred to two cases of *R.* v. *Tilley*[2] and the case of *John David O'Sullivan*[3] to support the appellant's contention on the question whether the jury should be left to decide questions of disputed handwriting on their own without the assistance of expert evidence and whether the course pursued by the Judge in that case was in accordance with the principle previously laid down. In *John David O'Sullivan's* case it was held that "there should never be an invitation or exhortation by the Judge to the jury to look at disputed handwritings for the purpose of making comparisons without the assistance of an expert."

These cases are of great persuasive value, nevertheless we decline to say that they can be relied upon as authorities. Suffice if we confine our exposition in the light of the provisions of our Evidence Act.

Now on the question of evaluation of evidence and the necessity to make critical and microscopic examination, we would deal with the points raised by the appellant concerning the view taken by the learned Judge in regard to Sgt. Paou's evidence; first, the learned Judge's conclusion that it was preposterous for Sgt. Paou to go and see the appellant on his own initiative without the appellant calling for him. It is not the appellant's contention that Sgt. Paou went on his own initiative but was sent by PW10. And the question whether the appellant and Sgt. Paou knew each other did not arise, indeed was never raised. Second, the failure by Sgt. Paou to report the payment of the extra $100 to PW10; it is the appellant's contention that this was clearly a case of failure to account. It is submitted that that being so the learned Judge ought to have considered that Sgt. Paou had every reason to lie to save his own skin. There is merit in the appellant's contention and in the light of the appellant's defence the learned Judge ought to have critically analysed Sgt. Paou's evidence.

The second limb of the first charge relates to the four missing receipts and concerns the purported payments of rewards to PC48867 Rujis anak Dunggau $100, PC54124 Stephen Malang $50 and PC48043 Abit bin Seruji $50. The learned Judge said that all had testified that they did not receive the rewards the appellant approved and authorised on December 12, 1974. Payment vouchers 171/74, 134/74 and 135/74 respectively (Ex. P24(a), P24(b), P24(c)) were signed by the appellant as an account operator, authorising officer and paying officer and records of these payments were made in the monthly returns for the month of December, 1974, and sent to the Accountant-General in Kuala Lumpur. The receipts were not produced because they were not in the files pertaining to the SSF for the years 1974 and 1975 kept by Dayang Khatijah (PW15), a stenographer attached to the appellant's office after the appellant handed them to her before the appellant went on transfer to Kuala Lumpur. These files were under lock and key held only by her.

The learned Judge accepted the testimony of PC Rujis, PC Stephen and PC Abit when they said that they did not receive the money. The learned Judge was right indeed. The defence did not challenge it. After setting out these facts, the learned Judge dealt with the four payments as follows:–

"When Poh signed as a witness on 4 blank SS receipts at the request of the accused in late 1974 or early 1975 in connection with the missing 4 PC receipts, he said in answer to question put by defence counsel that he did appreciate that he might be aiding and abetting the preparation of false documents."

Pausing here, it is to be noted that Poh was the Assistant Director of NBI Kuching when the appellant was the Director. Poh was a senior officer dealing with investigations and prosecutions. Poh's testimony was to the effect that he signed four blank receipt portions of SSF as witness to the payments and the appellant himself was to make the payment. The appellant denied

this. Poh as a witness was found by the learned Judge to be an accomplice. We refer to that part of the judgment where the learned Judge said –

"When the accused made Poh sign the 4 blank SS receipts as a witness the accused was alleged to have told Poh that he would pay the rewards to the 4 PCs in Sibu himself. For the purpose of this trial and in considering the testimony of Poh, I would treat him as an accomplice insofar as his evidence relating to the second limb of the first charge as well as Ex. D52 is concerned. Section 133 of the Evidence Act 1950 provides that 'an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice;'"

He then referred to a passage by Lord Reading C.J. in *R.* v. *Baskerville*[4] and applying this to the facts held that

"I hold and rule that there is no corroboration of the evidence of Poh in relation to Ex. D52 and about the signing of the 4 missing SS receipts for the 4 PCs as a witness. But I am satisfied beyond reasonable doubt that Poh is a truthful witness and I would accept his testimony even though uncorroborated."

The learned Judge concluded by saying that on the weight of the prosecution case he was satisfied beyond reasonable doubt that a *prima facie* case had been made out against the appellant which if unrebutted, would warrant a conviction.

It is pertinent in our view to observe that the prosecution was relying mainly on the testimony of Poh. The Deputy Public Prosecutor conceded that Poh was an accomplice but argued that he was an unwilling accomplice. The learned Judge quite rightly treated Poh as an accomplice (see *Chandrasekaran & Ors.* v. *Public Prosecutor*[5] at 155). He did warn of the danger of acting upon Poh's evidence without corroboration, indeed proceeded to hold that he was convinced that Poh was a truthful witness.

In our view the law is clear in that

"Whilst it is established principle that it is not illegal to act on the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount to almost a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused ..." *Bhuboni Sahu* v. *The King*[6] (See also *Davies* v. *Director of Public Prosecutions*[7])

At the trial before the learned Judge counsel for the appellant contended that this was not a very exceptional case where a trial Judge may fittingly convict. Now the question that has been posed before us is whether, in the circumstances of this case, the finding by the learned Judge as to the truthfulness of Poh's testimony was arrived at after the learned Judge had proceeded to critically, adequately and microscopically examine such evidence?

The questions that arise for us to consider are: first, did the learned Judge give adequate consideration to the evidence before him?; second, was the assessment of Poh's credibility arrived at in a manner this Court ought now to regard itself as precluded from considering it?; third, was there microscopic scrutiny and critical appreciation of the totality of Poh's evidence?; fourth, if there was, the fourth question is that though the learned Judge had the advantage of his having seen and heard the witness, whether his approach to the issue of credibility was so gravely erroneous as to constitute a serious misdirection and make the judgment wholly unsatisfactory (see *Tengku Mahmood* v. *Public Prosecutor*[8] per Raja Azlan Shah C.J. (as he then was)).

Our view upon close scrutiny of the evidence before us is that there emerges very clearly that by reason of the character and conduct of Poh in the matter, Poh's evidence should have been treated with greatest suspicion and the learned Judge ought to have minutely and critically scrutinized it. With all humility we say without the slightest reluctance that grossly insufficient consideration was given to certain salient facts favourable to the appellant. It is significant to note that Poh only raised the blank voucher incident during the investigation against the appellant at which time Poh himself was liable to be questioned regarding the $200 and if he were to admit receiving it would clearly have had to account for it. How could he? Manifestly the possibility of his wanting to shift that responsibility to the appellant should not at all be discounted. Evidence shows that Poh was in charge of making payments of rewards in connection with Sibu District Court Case No. B/CR/314/70 and the four alleged non-payments were directly related to the same case. The question therefore is why was he asked only to pay some and not the other four who were all from Sibu?

The other damaging factor to Poh's conduct is in connection with a sum of $3,800 (see Ex.D52) he admitted to have kept for himself even though it is clear that the money was intended for an informer described as CAS/A. He was not entitled to

it. Poh of course claimed that this was done at the direction of the appellant, nonetheless there was clear evidence to show that the money was not meant for him but for informer CAS/A and yet he pocketed it. He could not have not known that as a senior civil servant he was not entitled to receive the money. In connection with this payment there is a glaring error made by the learned Judge when he considered the endorsement at the back of D52 which reads –

"Paid to Poh Thuan Keat who knows the Service."

Sgd. Pengarah BSN
Sarawak."

to be unfavourable to the appellant. He observed that it was strange "Poh was not cross-examined by the defence counsel on the words appearing at the back of D52."

The endorsement, in our view, supports the appellant's case and cannot be the subject of an adverse inference but ought to have been considered favourable to the appellant.

We now turn to the proof of non-receipt of the reward money by the PCs concerned. In our view mere proof of non-receipt was not proof that Poh did not receive the money from the appellant in respect of the four missing receipts. It may well be the learned Judge would still have come to the same conclusion that he did if he had properly analysed Poh's evidence and in that event the Court should regard itself precluded from upsetting a finding of fact arrived upon proper evaluation of the evidence. That is hardly the case here. In our judgment, the learned Judge failed to analyse Poh's evidence on the basis of proper and microscopic evaluation and that makes his conclusion wholly unsatisfactory. There are in evidence other contradictions but we do not propose to deal with each and everyone of them. These were amply highlighted by counsel for the appellant in his submission before the learned Judge in the Court below.

In the final analysis we are of the view that on close scrutiny of the evidence, viewed in its totality bearing in mind particularly the unsatisfactory features of Poh's evidence, the learned Judge had not given adequate consideration to the salient points before him crucial to the defence. We are unable to say that by reason of the learned Judge's approach to the assessment of Poh's credibility, the manner the conclusion was reached, this Court can regard itself precluded from considering it afresh.

With respect to the learned Judge, we are far from satisfied that the learned Judge had effected microscopic scrutiny and embarked upon a critical appreciation of Poh's evidence to justify this Court to affirm his finding and sustain the conviction. Although he had the advantage of having seen and heard the witness, his approach to the issue of credibility was gravely erroneous and we do not hesitate to say that there was serious misdirection as would occasion a failure of justice.

For these reasons, we would allow the appeal on the first charge, set aside the conviction and sentence and substitute an order for acquittal.

Second Charge

We now proceed to consider the second charge. The prosecution relied heavily on the credibility of the testimony of Daniel Chai (PW12). It was the prosecution case that a payment was made to PW12 by the appellant in May, 1975. PW12 testified that he never received it. At the time of the alleged commission of the offence by the appellant PW12 was an A.S.P. attached to and throughout had been with the NBI as an investigating officer (October, 1968 to May 31, 1975). At his request made in December, 1974 he was transferred back to the Police Force commencing on June 1, 1975. He reported for duty on June 3, 1975. PW12's immediate superior officer was Poh, Assistant Director, NBI Kuching who prominently featured as a witness for the prosecution in relation to the second limb of the first charge. The appellant was the Director.

Evidence was introduced to the effect that the appellant made up vouchers for payment from SSF to PW12 as advance for a possible trap case in an investigation involving the Kuching Port Authority. There was no investigation and PW12 never asked or received the payment from the appellant. It all began and the case unfolded some time in 1979 when the appellant received a letter from Dato' Abdul Aziz, then Director-General NBI to explain this payment of $500 allegedly made to PW12.

PW12 testified that he was not assigned with new duties as he was due to return to the police

force on June 1, 1975. He identified payment voucher dated May 31, 1975 for the sum of $500 (Ex. P25(a)) where the appellant signed as account operator, authorising and paying officer and the payment is stated to be an "advance to be used for possible trap case in PA case." The appellant signed the receipt portion "for" as well as a witness. PW12's signature does not appear on the space provided for the recipient. No number has been allocated for the payment voucher and words "Temporary Receipt" in pencil are written therein.

In the monthly returns of SSF to the Accountant-General on June 8, 1975 there is an entry of $500 dated May 31 in the payment voucher receipt No. 54/75. The returns were certified by the appellant.

These facts are not in dispute. The learned Judge stated in his judgment that PW12 was subjected to lengthy and penetrating cross-examination by counsel for the defence and in the end his evidence remained unshaken and hence his acceptance of PW12 as a witness. He added that there was no reason why PW12 should lie against the appellant. He believed PW12 when he testified that he did not receive and the appellant did not hand over to him $500 cash on May 31, 1975

The learned Judge drew his attention to the appellant's defence that one or two days before the appellant left for Peninsular Malaysia on a goodwill mission with members of Sarawak group PW12 came to the appellant's office accompanied by an informer and Sgt. Chong (DW2) and informed the appellant that he was to make payment to an informer in a trap customs investigation and, having agreed with the plan, he gave $500 cash to PW12. PW12's signature was not taken as he was in a hurry and an acknowledgment from PW12 was to be taken later. That same afternoon the appellant tried but could not contact PW12. He tried again the next day but also failed. The appellant left for Peninsular Malaysia. On his return he was busy with social activities and forgot about that incident. On closing the account he found $500 short. The appellant recalled that he gave $500 to PW12 hence the temporary receipt dated May 31, 1975.

The appellant received a letter from Dato' Aziz to explain the $500 on May 12, 1979. He replied stating what in effect is repeated in the defence.

It is also the appellant's case that he contacted PW12 for a refund of the money. PW12 agreed to contact the informer to recover the money and would then pass it to NBI Kuching. In August, 1980 Sgt. Chong informed the appellant that he received a sealed envelope from PW12 (PW12 was then stationed in Limbang Sarawak) but did not know how to contact the appellant. The appellant then told him to contact Dasri (DW3) a former NBI officer then working with Sarawak Development Board who used to visit Kuala Lumpur. Subsequently the appellant received the envelope from DW3. Inside was $500.

The learned Judge concluded by saying that "the story of the accused is substantially corroborated by Sgt. Chong and Dasri in so far as the second charge is concerned."

The very next paragraph in his judgment the learned Judge said –

> "Both accused and Sgt. Chong were severely cross-examined by the Senior Federal Counsel. I have given careful consideration to their testimonies and I reject them."

He proceeded to set out his reasons (a) to (p). In (a) the learned Judge posed a question as to why PW12 should make a refund if he did not receive the money. Learned counsel for the appellant submitted that this was not a reason but a question which begs a question.

The learned Judge then observed that it would have been easy for the appellant to ask PW12 to refund to NBI Kuching instead of going in a roundabout way. The appellant's contention is that PW12 could not possibly have wanted to disclose the fact that he received the money five years later.

In (c) the learned Judge commented (not in dispute) that the appellant did not know Sgt. Chong was present when he handed the $500 to PW12 and he only came to know after he was charged in the High Court at Kuching.

Para (d) was a comment by the learned Judge on the appellant's failure to contact Dasri when in Kuching and that he only did so after the defence was called. The appellant's answer is that there was no need to make a comment adverse to the appellant as Dasri was only a postman in the delivery of the envelope.

And as for (e) the learned Judge also made a comment on the appellant's failure to brief his

counsel about Sgt. Chong until after the Court had ruled that the appellant had a case to answer. The appellant submitted that the reason was obvious in that the appellant feared that Sgt. Chong would be victimised. This aspect of the matter concerning Sgt. Chong will be dealt with shortly.

The appellant also submitted that the reason given in (f) was not a reason but a comment without any significance when the learned Judge said that the appellant did not ask Sgt. Chong whether he remembered the handing over by PW12 of the envelope when he (Sgt. Chong) saw the appellant at Aurora Hotel on April 1, 1981.

In para (g) the learned Judge questioned why Ismile did not take a follow-up action if the appellant had in fact spoken about the matter to him. The appellant submitted that this was also a question that begged a question. Following this the learned Judge questioned why, when the appellant returned to Kuching in January 1976, did he not try to contact PW12 about the $500. The appellant said this question did not arise until 1979. In para (i), the learned Judge said that the appellant only closed the account in May and forwarded it to the Accountant-General on June 8, 1975 and he recalled the incident on May 31, 1975 he therefore had a few more days to contact Chai. The appellant has submitted that after May 31, 1975 PW12 was no longer in Sarawak.

One of the other reasons given by the learned Judge, para (j), was that although the SS payment voucher and the receipt (Ex.P25(a) & (b)) do not bear any number, but in the Cash Book number 54/75 appears. It is his view that the appellant intended to give the impression that 54/75 was the number of SS payment voucher and receipt.

The appellant contended that this number would have remained correct if PW12 eventually signed. The fact that a temporary receipt was put in showed that the appellant had no intention to deceive.

The appellant also contended that questions raised and comments made by the learned Judge in paras (k) to (n) were not reasons. In para (k) the learned Judge posed a question that if PW12 had received the $500, why did he not return the money. He then referred to the trap commenting that it was unusual for the appellant to accept plan of a trap from a junior officer without discussion or planning with a Senior Officer (l). An observation followed to the effect that it was unusual for PW12 to bring along Sgt. Chong when he was taking the informer to see the appellant as the identity of the informer was to be kept secret (m). The next para (n) was also a comment to the effect that Sgt. Chong who saw PW12 hand over the $500 to an informer did not know whether PW12 obtained an acknowledgment from the informer. In the following para (o) the learned Judge questioned why the appellant did not ask Sgt. Chong to look for PW12 after he recollected the incident. The appellant's answer here is he did look for PW12. In the penultimate paragraph, the learned Judge questioned why, if PW12 had received the $500, didn't he return it to the appellant or Poh before his return to Kuala Lumpur. The appellant said that this was a question that begged a question.

We have carefully analysed what the learned Judge described as reasons for rejecting the testimony of both the appellant and Sgt. Chong to decide whether the foundation upon which the learned Judge formed his reasons, is strong enough to withstand the vigorous attack made by counsel for the appellant to demolish it. It rests with this Court to determine whether there is sufficient validity in the arguments advanced by the appellant to warrant a finding that the learned Judge seriously and gravely misdirected himself on the issue before him.

Before we direct our attention to the main ground of appeal, we propose to deal first with the defence witness Sgt. Chong. Sgt. Chong corroborated the testimony of the appellant and it was held to that effect by the learned Judge. Nevertheless, after reviewing the defence, the learned Judge found that the testimony of Sgt. Chong was but a piece of well-rehearsed, deliberate and elaborate concoction and/or fabrication. It is contended before us that in arriving at the conclusion that he did the learned Judge failed to consider the fact that Sgt. Chong really had nothing to gain by giving evidence for the appellant. In fact he ran the risk of being victimised. And further, as the evidence shows, he was very severely subjected to intensive and painful interrogation. That was not all for Sgt. Chong was harassed by PW12.

It is the appellant's contention that the aim was clear and that was to break him down and make him change his statement. The fact that PW12 took an active part in the interrogation was hardly

challenged. In the light of this serious allegation, the learned Judge ought therefore to have given serious attention to the testimony of Sgt. Chong. But as can be seen from the judgment only a brief reference was made, and it was more in passing, as follows:—

"Before departing from this case, there is one other matter I like to comment upon. The accused, in the course of his evidence, complained that BSN officers descended on Sgt. Chong as soon as his name was given in court. Since I have held that Sgt. Chong was not a truthful witness, I like to refer to a passage in the case of *R.* v. *Alan Rex Kellett* (1975) 65 Cr. A.R. 240 at p.249 where Stephenson L.J. in giving the judgment of the Court of Criminal Appeal said:

'With this authority in mind we would not consider that the offence of attempting to pervert the course of justice would necessarily be committed by a person who tried to persuade a false witness, or even a witness he believed to be false, to speak the truth or to refrain from giving false evidence.'"

The passage cited is, in our view, out of context and quite unnecessary. There is hardly any need for any authority. What was required of the learned Judge was to properly direct his mind to the issue to determine whether Sgt. Chong could indeed have spoken the truth for despite the harassment by PW12, he maintained what he had told to the officer who recorded the statement. The full significance of the appellant's contention will be more apparent when we come to PW12.

For purposes of the appeal against the conviction on the second charge, suffice if we confine to the appellant's main ground, namely, his complaint against PW12. It is evident that the prosecution was relying chiefly on the testimony of PW12. The learned Judge could not have failed to appreciate this. Thus to properly make a finding as to the credibility of PW12, it was necessary for the learned Judge to evaluate PW12's evidence very carefully. Moreover by reason of PW12's conduct there was all the more reason why he should have proceeded in that manner.

It is true that the learned Judge did make a finding of fact but the question is can it be said that, in the circumstances of this case, such finding was arrived at after a careful and critical analysis of the evidence of PW12. We hardly think so.

It seems appropriate for us to stress at this point that an appeal Court is well-conscious of the *prima facie* difficulty and unwisdom of reversing a trial Judge on a matter of fact deposed to by a witness whom the trial Judge had seen and heard. *(Kim Guan & Co. Sdn. Bhd.* v. *Yong Nyee Fan & Sons Sdn. Bhd.)*[9] But it is equally settled principle that an appeal Court is entitled to interfere with a finding of a trial Judge if they were satisfied that the trial Judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion. *(Chow Yee Wah & Anor.* v. *Choo Ah Pat*[10]).

In the instant case it was necessary for the learned Judge to proceed to evaluate the testimony of PW12 in a manner in accordance with the settled principle, particularly where there are reasons to believe that this witness had sufficient motive to tell an untruth.

We reiterate that the learned Judge accepted PW12 as a witness of truth and he gave his reasons. These reasons were vigorously attacked by the learned counsel for the appellant.

The learned Judge said that he saw no reasons why PW12 should lie against the appellant. But in his judgment the learned Judge drew his attention only to the receipt by PW12 of the reward money in the sum of $1,000. The relevant paragraph in the judgment reads —

"It was not disputed that Poh paid the $1,000 to Inspector Chai on November 6, 1975. According to Poh, he handed the $1,000 to Inspector Chai on the instructions of the accused but this was denied by the accused. Since the name 'Daniel' appeared in the space provided for recipient SWK/BPR/CAS/B, I am satisfied that the reward money was intended for Inspector Chai and was properly received by him. The accused must have seen the word 'Daniel' written on it and must know that it had been received by Inspector Chai. Until this trial the accused had never queried that the reward of $1,000 had been wrongly paid to Inspector Chai. In the light of this finding, I find that Ex.D. 37(a) and (b) do not affect the credit of Inspector Chai."

In this connection we have stated earlier when we dealt with the reward money received by Poh that he could not have not known as a senior officer he was not entitled to receive the money. The same, in our view, must be said of PW12. PW12 too received the money he was not entitled to do. But for a reason we cannot accept, the learned Judge held that the reward money was intended for PW12 and was properly received by him. That, we think, was erroneous. The evidence is clear on this point. PW12 was not entitled to receive the money for the simple reason that it was meant

for an informer. Even if the appellant may have been somewhat to blame, this fact would not have made a wrong right. If therefore the learned Judge had proceeded to make a finding of fact based upon erroneous premises, it is open to this Court to consider afresh and make a finding that may properly be arrived at from the available evidence and in the light of the circumstances of the particular case. And in the instant case this Court cannot omit to consider the conduct of PW12.

Therefore in this regard it was necessary for the learned Judge to properly direct his mind to the question pertaining to the reward money and to determine whether on that account PW12 had reason to lie against the appellant.

On the evidence we do not hesitate to say that the learned Judge had erred when he concluded that the money was properly received by PW12. If indeed he had erred, it would have meant that his failure to consider PW12's testimony in that light constituted a misdirection.

In our view, much as we do not wish to speculate, the reason why PW12 was prepared to lie against the appellant might have been on account of his complicity in the appropriation of the reward money that was meant for someone else. An inference can therefore be drawn that, having kept the money for himself, PW12 was prepared to perpetrate a deceit to cover his own dishonest act.

But what we have stated this far concerning the conduct of PW12 seems trivial compared to the hideous role played by him in the interrogation of Sgt. Chong, a defence witness, designed clearly to discredit Sgt. Chong and the appellant.

There is hardly any challenge, indeed we are satisfied that PW12 took an active part in the interrogation of Sgt. Chong. Now to do so while proceedings were actively in progress, the intention being to induce Sgt. Chong to change his statement, PW12 was clearly attempting, to say the least, to pervert the course of justice.

The learned Judge completely failed to take this into consideration. Manifestly he failed to properly direct his mind to the defence contention that, by reason of the conduct, PW12's evidence ought to have been treated with grave suspicion. We are satisfied that this factor was of vital importance to the appellant and ought to have been taken into consideration by the learned Judge in the assessment of the credit of PW12.

The only mention made by the learned Judge in his judgment, more in passing, was a reference to someone described as "meddler" (it may well have been the appellant). The learned Judge had this to say –

> "Even if the intention of the meddler with a witness is to prevent perjury and injustice, he commits the offence if he meddles by unlawful means. Here, the accused had not alleged that BSN officers had adopted unlawful means in interrogating Sgt. Chong."

Apart from this short passage nothing was said as to the conduct of PW12. If what is stated in that paragraph is anything to go by and can be said to refer to PW12, the impression we get from this is that what PW12 had done was a perfectly lawful act properly and legally sanctioned. If however it cannot be said that the learned Judge had PW12 in mind what it really meant was that he had completely ignored to take into account the conduct of PW12.

Assuming further that the learned Judge had PW12 in mind, he could not, in our view, have been more wrong for the simple reason that PW12 was not only a witness for the prosecution but in fact the key witness upon whose testimony the prosecution solely relied. Therefore by reason of the conduct of PW12, the learned Judge ought to have seriously considered his testimony in that light. If upon consideration he found that no credit could be attached to PW12's testimony, that in our view would have been sufficient to demolish the entire prosecution case on that charge. We may add that if a doubt were raised in the mind of the learned Judge as to the prosecution case, it would also have had an adverse effect upon the prosecution case sufficient to render it wholly unsatisfactory and to warrant acquittal of the appellant of that charge.

It is no exaggeration therefore for us to say that there was a real necessity for the learned Judge to treat PW12's testimony with great suspicion and then to critically assess it, tested in its totality, and also to microscopically analyse to determine what credit, if any, could be attached to his testimony.

The omission or failure to take into consideration a factor such as this constitutes, in our view, a serious misdirection as to occasion a failure of justice. Such a misdirection goes to the root of the matter and it materially affects the very foundation upon which the learned Judge grounded his findings. In our view on this count alone is sufficient for this Court to interfere with such findings.

In the light of what we have stated sufficient grounds exist for us to say, without considering other unsatisfactory features of the case, that the appellant's conviction on the second charge cannot possibly stand and accordingly we allow the appeal on the second charge. The conviction is quashed, and the appellant is acquitted and discharged.

Conviction quashed;
Appellant acquitted & discharged.

Solicitors: *Ee & Lim.*

MERIAM BINTI YAACOB & ORS. v. SHELL MALAYSIA TRADING SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Syed Agil Barakbah F.JJ.) November 15, 1983 & January 20, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 78 of 1983]

Practice & Procedure – Execution – Application for sale of land – Prohibitory order – Whether prohibitory order validly effected – National Land Code, s. 334.

Land Law – Execution – Application for sale of land – Prohibitory order – Whether prohibitory order validly effected.

In this case the fourth appellant, one Mohamed Kunjoo, had obtained judgment for some $60,000/– against K.K. Enterprises. He commenced execution proceedings seeking an order of sale of land registered in the name of the first appellant, Meriam, a partner of K.K. Enterprise. Subsequently an application was made by Union Chemicals to intervene in the application for execution in respect of the land on the ground that Meriam held the land in trust for Union Chemicals. It was ordered that Union Chemicals should state its claim by filing a defence and it was directed if they failed to do so, the execution should proceed. No defence was filed by Union Chemicals. They had filed a caveat but on account of their failure to comply with the order the caveat was removed.

Kunjoo then asked for an order of sale by private treaty and an order was obtained. It was then found that the respondents had caused a prohibitory order to be issued against the land. The respondents had obtained judgment against Union Chemicals for $64,000/–. In the execution proceedings brought by the respondents an order was made to issue a prohibitory order and they were to proceed against Union Chemicals on the basis that Meriam held the land in trust for Union Chemicals. The respondents issued a writ and asked for a declaration that the land at all relevant times was held by Meriam for Union Chemicals. The fourth appellant, Kunjoo, applied to have the writ set aside on the grounds that the respondents had no *locus standi* and/or as being an abuse of the process of the court. It was agreed that the prohibitory order should be vacated to enable the land to be sold, the proceeds of sale to be deposited in court until final order. Kunjoo also applied that the balance of moneys be paid to him towards the judgment obtained by him. The respondents on the other hand applied for the balance to be paid to them in satisfaction of their judgment against Union Chemicals.

The learned judge dismissed both the applications of Kunjoo. Kunjoo appealed.

Held: (1) on the uncontroverted facts it is abundantly plain that the onus was upon Union Chemicals to establish that Meriam held the land in trust for them. They did not pursue the claim, indeed abandoned it. It could not therefore be said that Meriam was the trustee of the Union Chemicals;

(2) Union Chemicals could no longer be said to be an equitable owner of the property as they had ceased to have any equitable interest therein. There was therefore no interest of the judgment debtor for the respondents to attach;

(3) as Union Chemicals had ceased to have any interest whatsoever in the land the registration of the prohibitory order on the strength of an alleged or purported interest of an equitable owner in land could not be said to have been validly effected and would not have any legal effect;

(4) the respondents could and ought to have intervened during the pending proceedings of Union Chemical's intervention. Having failed to do that, they missed the boat and it was too late to seek relitigation of the matter after Union Chemical's right had been finally extinguished;

(5) the appeal should therefore be allowed. The orders of the learned judge should be reversed and the applications of Kunjoo allowed.

Cases referred to:

1. *Reference by Registrar of Titles* [1935] M.L.J. 287.
2. *Boase* v. *Cluny Rubber Estates Ltd. & Ors.* [1913] 2 F.M.S.L.R. 130.
3. *Motor Emporium* v. *Arumugam* [1933] M.L.J. 276.
4. *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.

FEDERAL COURT.

Shah Balendran for the appellant.
S. Sivasubramanian for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the Judgment of the Court): The appeal is against the order of the